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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-5688

TRACY LEE HUDSON,

Petitioner,

vs.

THE STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Louisiana was rendered on June 25, 1979 (A. 39a); a dissenting opinion was filed on June 27, 1979 (A. 47a); application for rehearing was denied on September 4, 1979 (A. 53a); it is reported as *State v. Hudson, La.*, 373 So.2d 1294 (1979).

The opinion of the Supreme Court of Louisiana affirmed the ruling of the Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana (A. 25a). The District Court therein denied petitioner's writ of habeas corpus on the issues herein presented.

JURISDICTION

The opinion filed on June 25, 1979, which became final upon denial of rehearing on September 4, 1979, is presented for review. The petition for certiorari was filed within ninety (90) days of denial of rehearing in accordance with Rule 22(1) of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked because of allegation that the Supreme Court of Louisiana has decided a United States Constitutional question not before determined by this Court which was decided in a way not in accord with applicable decisions of this Court. Rule 19(1)(a) of the Rules of the Supreme Court of the United States. And which State Court decision denies petitioner his right and privilege against being twice placed in jeopardy for the same offense in violation of the Fifth Amendment. 28 U.S.C.A., Supp. 1970, §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

United States Constitution, Amendment V:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

LSA-C. Cr.P. art 778 (as appeared prior to amendment No. 527, in 1975):

"In a jury trial the court may direct a verdict of not guilty of one or more of the offenses charged, on its own motion or on that of a defendant, after the close of the state's evidence or of all the evidence, if the evidence is insufficient to sustain a conviction.

"In a trial by the judge alone the court shall enter a judgment of acquittal on one or more of the offenses charged, on its own motion or on that of a defendant, after the close of the state's evidence or of all the evidence, if the evidence is insufficient to sustain a conviction.

"If the court denies a defendant's motion for a directed verdict or judgment of acquittal at the close of the state's case, the defendant may offer his evidence in defense."

LSA-C. Cr.P. art 778 (as was in existence during all times pertinent to the case at bar):

"In a trial by the judge alone the court shall enter a judgment of acquittal on one or more of the offenses charged, on its own motion or on that of defendant, after the close of the state's evidence or all of the evidence, if the evidence is insufficient to sustain a conviction.

"If the court denies the defendant's motion for a judgment of acquittal at the close of the state's case, the defendant may offer its evidence in defense."

LSA-C. Cr.P. art 851 provides:

"The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied no matter upon what allegations it is grounded.

"The Court, on motion of the defendant, shall grant a new trial whenever:

"(1) The verdict is contrary to the law and the evidence, or

"(2) The court's ruling on a writ and motion, or an objection made during the proceedings, shows prejudicial error, or

"(3) New and material evidence that, notwithstanding exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial, it would probably have changed the verdict or judgment of guilty, or

"(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that notwithstanding the reasonable diligence by the defendant was not discovered before the verdict or judgment, or

"(5) The court is of the opinion that the ends of justice would be better served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

QUESTIONS PRESENTED

1. Whether or not the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered solely for lack of sufficient evidence to sustain the jury's verdict.

2. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution applies to the State of Louisiana only if there is a finding of *no evidence* by the trial judge or if the double jeopardy clause of the Fifth Amendment applies to the State of Louisiana if there is a finding of *insufficient evidence* beyond a reasonable doubt.

STATEMENT OF THE CASE

On January 4, 1977, Tracy Lee Hudson, hereinafter referred to as "petitioner", was charged with first degree murder in the District Court in and for the Twenty-Sixth Judicial District, Parish of Bossier, Louisiana, Criminal Docket No. 54,924; on March 2, 1977, petitioner was found guilty by a jury; on March 7, 1977, the Honorable Enos C. McClendon, sustained a motion for new trial on the sole ground that the evidence presented by the State was insufficient to sustain the verdict of guilty. Judge McClendon reasoned:

> "In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim." (A. 10a)

The Supreme Court of Louisiana upheld that decision. *State v. Hudson,* 344 So.2d 1 (1977).

Petitioner was retried and found guilty on September 20, 1977. At the retrial the State for the first time introduced an eyewitness who stated he had viewed the petitioner stabbing the victim; this eyewitness is the difference between insufficient evidence in the first trial and sufficient evidence in the second trial; there were no other eyewitnesses and this eyewitness's testimony is shrouded with discrepancies between his testimony and that of other State's witnesses. (A. 16a-18a) On June 19, 1978, the Supreme Court of Louisiana issued its opinioin affirming the second conviction (A. 12a) *State v. Hudson,* 361 So. 858 (1978). A rehearing was denied on August 31, 1978.

On October 2, 1978, based on *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), a writ of

habeas corpus was filed on behalf of petitioner (A. 19a); on November 13, 1978, writ was denied by the Honorable Cecil C. Lowe, Judge, Twentieth-Sixth Judicial District, Bossier Parish, Louisiana. (A. 25a)

Writ of Certiorari was accepted by the Supreme Court of Louisiana, oral argument held, and the writ was denied by order entered June 25, 1979 (A. 39a), one Justice dissenting (A. 47a); rehearing was denied by order filed September 4, 1979, with three of seven justices stating they would grant a rehearing. (A. 53a) From such denial of rehearing, petitioner timely requested this Court to accept Writ of Certiorari to the Supreme Court of the State of Louisiana, which was accepted by order on the 14th day of April, 1980.

ARGUMENT

UNDER LOUISIANA STATUTORY LAW AS IT EXISTED AT ALL TIMES PERTINENT HERETO, PETITIONER HAD ONE AND ONLY ONE MOTION AVAILABLE IN WHICH TO REACH THE ISSUE OF INSUFFICIENT EVIDENCE BEFORE THE TRIAL COURT—A MOTION FOR A NEW TRIAL.

It should first be noted that in *Burks,* by dicta, this Court indicated its view on the prior "waiver" rule wherein it was deemed that if a defendant filed a motion for new trial, he thereby waived any legal argument based on double jeopardy:

> "In our view, it makes no difference that a defendant has sought a new trial as one of his remedies or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." (2150)

Under Louisiana statutory law as it existed at all times pertinent hereto, petitioner had but one and only one legal vehicle in which to raise the issue of insufficient evidence, and that is by motion for new trial. There was no motion for acquittal, demurrer to the evidence, or motion for directed verdict available to petitioner under the statutory procedural scheme of the State of Louisiana.

In the Constitutional and Statutory Provisions cited, supra, petitioner has set out in full LSA-C. Cr.P. art 778 as it appeared prior to amendment No. 527, in 1975, and then again as art 778 subsequent to 1975 and at all times pertinent to the case at bar. This post 1975 statute is identical in all respects to the pre-1975 statute except that the first paragraph has been entirely omitted.

It is that first paragraph which was so omitted that prior to 1975 permitted the trial judge during a jury trial either at the close of the state's case or at the close of all evidence to sustain a demurrer or motion for directed verdict if in the view of the trial judge the evidence was insufficient to sustain a conviction.

It would indeed be an anomaly to permit a state to strike from its statutory scheme all alternate procedures for raising the issue of insufficient evidence except the legal vehicle of motion for new trial and then to hold that use of such motion was a waiver of the protection afforded by the Fifth Amendment double jeopardy clause.

THE OPINION OF THE LOUISIANA SUPREME COURT HEREIN APPEALED FROM (A. 39a) IS AT THE OUTSET BASED ON TWO FAULTY PREMISES.

First, it is based on the premise that the trial judge in sustaining the motion for new trial merely found the evidence

to be insufficient; in the wording of the Louisiana Court, "... lack of sufficient evidence to sustain the jury's verdict." (A. 39a)

The trial court's oral reasons for sustaining the motion for new trial could not have been more precise and in contrast with the supposition of merely insufficient evidence had the defendant uttered the words himself. The trial court reasoned:

> "In the present case, I heard the same evidence the jury did, I'm convinced that there was *no evidence, certainly not evidence beyond a reasonable doubt,* to sustain the verdict of homicide committed by the defendant of this particular victim." (Emphasis added.) (A. 10a and 39a)

Indeed, the entire transcript of the trial judge's decision on the motion for new trial (A. 7a) yields only one inference, and that is that there was no evidence beyond a reasonable doubt before the jury of the essential elements of the crime charged. The trial court defined the issue himself based on the argument of counsel, as follows:

> "The argument was, however, that there was no evidence presented that would have justified the jury in finding the defendant guilty as charged because there was no evidence beyond a reasonable doubt before the jury of the essential elements to prove the essential elements of the crime." (A. 8a)

Hence, from the inception of the trial court's ruling in defining his issue through his legal reasoning and discussion of the case and through his final statement or holding, he discussed the sufficiency of the evidence, relying most often on the term "no evidence."

Second, the Louisiana Supreme Court's opinion is based on the premise that the *Burks* opinion applies to the instant case only if there is no evidence of the crime or no evidence of

an element of the crime charged, as opposed to insufficient evidence to prove the crime beyond a reasonable doubt.

This second faulty premise is one of the issues raised herein and if sustained, makes the first moot; that is, if indeed the *Burks* decision and the double jeopardy clause of the Fifth Amendment mandates the State of Louisiana to apply the standard of sufficient evidence to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt, then it makes no difference whether the trial court ruled on a no evidence standard or on a reasonable doubt/insufficient evidence standard, because either standard would mandate the release of petitioner herein.

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRECLUDES A SECOND TRIAL AFTER A JURY'S VERDICT HAS BEEN SET ASIDE SOLELY FOR LACK OF SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT.

This Court, in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), stated:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks,* 2147.

In the case at bar the essential testimony supplied in a second trial that was not present in the first was the testimony of an eyewitness who stated that he had told a policeman at the scene that he had observed the crime; but his name got lost somewhere (R. 215) for about ten months. There are unanswered questions concerning the delayed or sudden

appearance of this eyewitness which the petitioner must live with; moreover, such unanswered questions are not germane to the issues herein; what is germane, however, is that the State was afforded ". . . another opportunity to supply evidence which it failed to muster in the first proceeding". *Burks, supra,* 2147.

Chief Justice Burger set forth the issue in *Burks,* as follows:

> "We granted certiorari to resolve the question of whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court *solely for lack of sufficient evidence to sustain the jury's verdict.*" 2143

In the instant case, Justice Blanche of the Louisiana Supreme Court set forth the issue:

> "The issue presented is whether the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered pursuant to LSA-C. Cr.P. art 851, *solely for lack of sufficient evidence to sustain the jury's verdict.* (A. 39a) (Emphasis added.)

The only difference is that in *Burks* the reversal was by appellate review and in the instant case the reversal was by motion for new trial pursuant to Louisiana Statutory Law. The Louisiana Court resolved this difference thusly:

> "While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both." (A. 42a)

The Court then set out what they deemed the pertinent part of LSA-C. Cr.P. art 851, (A. 42a) which can be condensed further in pertinent part, to:

* * *

"The Court, on motion of the defendant, shall grant a new trial whenever

"(1) The verdict is contrary to . . . the evidence."

* * *

The Louisiana Court then cited case law supporting the proposition that under art. 851 the trial judge can grant a new trial if the evidence is insufficient to convict.

Hence, there is no issue presented by the Louisiana Supreme Court's opinion (A. 39a) on whether the insufficient evidence is found on appellate review or a motion for new trial.

There is, further, no difference between the standard of evidentiary review set out by Chief Justice Burger in *Burks* and by Justice Blanche in the case at bar on the questions set forth in the respective cases to be examined:

". . . solely for lack of sufficient evidence to sustain the jury's verdict." *Burks,* 2141 and *Hudson.* (A. 39a)

The difference, however, is that in *Burks,* Chief Justice Burger held that lack of sufficient evidence to sustain the jury's verdict in the first trial barred retrial; in the instant case, Justice Blanche held that lack of sufficient evidence to sustain the jury's verdict in the first trial did not bar retrial.

THE REAL ISSUE THEN, WHICH IS HEREIN PRESENTED, IS: WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION APPLIES TO THE STATE OF LOUISIANA ONLY IF THERE IS A FINDING OF *NO EVIDENCE* BY THE TRIAL JUDGE OR IF THE DOUBLE JEOPARDY CLAUSE OF

THE FIFTH AMENDMENT APPLIES TO THE STATE OF LOUISIANA, WHERE THERE IS A FINDING OF *INSUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT.*

The Louisiana Supreme Court resolved this issue against petitioner. The Louisiana Court therein stated:

> "The question in the instant case is whether *Burks* compels the same result where the trial judge grants a motion for new trial on grounds of *insufficient evidence* as opposed to granting the motion on the grounds of *no evidence.* We believe it does not." (A. 43a)

However, in *In Re: Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), this Court stated:

> "Least there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (1073)

In *Jackson v. Virginia,* 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Court stated:

> "This is the first of our cases to expressly consider the question whether the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." (2786)

The petitioner in *Jackson* was seeking Federal Habeas Corpus review of his case based on a claim that he had been convicted in a state court upon insufficient evidence; the question presented was what standard to apply. This Court answered the question thusly:

> "We hold that in a challenge to a state criminal conviction brought under 28 U.S.C., §2254 . . . the applicant is entitled to a habeas corpus relief if it is found that upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." (2792)

This Court, in *Jackson,* specifically rejected the "no evidence" rule of *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) as ". . . inadequate to protect against misapplications of the constitutional standards of reasonable doubt . . ." (2790)

The case at bar presents a stronger posture in that the trial court actually sustained a Motion for New Trial solely on the grounds of insufficient evidence.

The trial judge in his oral ruling stated: ". . . there was no evidence . . .", but then qualified that statement with ". . . certainly not evidence beyond a reasonable doubt, to sustain the verdict . . ." (A. 10a)

The only ambiguity in the trial court's ruling is whether he was basing his decision on the "no evidence" standard of *Thompson, supra,* or on the "insufficient evidence beyond a reasonable doubt" standard. An "ambiguity" without a distinctiion if petitioner's position is sustained herein; if this Court allows Louisiana to apply the "no evidence" standard on a motion for new trial, then the question of what standard the trial court applied must be determined; but if Louisiana must, as *Jackson* and *In Re: Winship* suggest, apply the "insufficient evidence beyond a reasonable doubt" standard, then petitioner must be acquitted.

As late as May 19, 1970, the Louisiana Supreme Court has indicated its hesitancy to follow the "reasonable doubt" standard of *Jackson*:

> "The Court has yet to fully embrace Jackson v. Virginia.[3]

* * *

Footnote 3:

"Although this Court in *State v. Matthews,* supra, [375 So.2d 1165] and *State v. Abercrombie,* 375 So.2d 1170 (La. 1979) suggested in dicta that it would follow *Jackson,* following those cases the Court has been less than explicit about which standard applies to this Court's review on direct appeal. It remains for future cases for this Court squarely to confront the question of whether it will follow *Jackson* or persist in the 'no evidence' standard of review". *State v. Custard,* S.Ct., Louisiana No. 66,295, _____ So.2d _____ (1980).

With due respect to the Supreme Court of Louisiana: Must they embrace the "reasonable doubt" standard of *Jackson,* or may they persist in the "no evidence" standard of review? Must they acquit on a finding of insufficient evidence beyond a reasonable doubt, as in *Burks,* or may they give the state a second chance to muster new evidence?

It is petitioner's contention that the same double jeopardy clause that applied to *Jackson* and to *Burks,* applies to Hudson.

The Fifth Amendment Double Jeopardy Clause is binding on the State of Louisiana. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); jeopardy attached when the Louisiana jury was empaneled and sworn to try the instant case. *Crist v. Bretz,* 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); a finding of insufficient evidence to convict made by the Louisiana Supreme Court requires acquittal (even if defendant sought a motion for new trial—dicta). *Burks v. United States, supra;* the "reasonable doubt" standard of review must be embraced by the Louisiana Supreme Court. *Jackson v. Virginia, supra;* and the granting of a motion for new trial on the ground of insufficient evidence beyond a reasonable doubt to sustain

the jury's verdict by a Louisiana trial judge, bars retrial in the instant case.

CONCLUSION

Petitioner filed a motion for new trial, which was sustained by the trial court on the sole basis of either no evidence of a necessary element being his criminal responsibility for the act alleged, or on the ground of insufficient evidence beyond a reasonable doubt, by which a jury could find that petitioner was the individual who had committed the act alleged. It is petitioner's contentioin that the standard of sufficient evidence beyond a reasonable doubt must be applied by any reviewing court, whether it be the trial court or an appellate court; that if such reasonable doubt standard is applied to the facts in the instant case, there need be no resolution or interpretation of the trial court's ruling as to whether it was based on the "no evidence" standard, because either would require acquittal of this petitioner if the latter standard is mandated upon the Supreme Court of Louisiana by the Fourteenth and Fifth Amendments to the United States Constitution and by prior decisions of this Court, namely, *In Re: Winship, Burks,* and *Jackson, supra.*

That for the foregoing reasons, Petitioner herein is entitled to an order directing a judgment of acquittal.

Respectfully submitted,

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